IN THE

Supreme Court of the United States

October Term, 1942.
No. 285

WILL H. PERRY, also known as WILLIAM H. PERRY,
Petitioner,

vs.

ANNA BAUMANN, MAUD E. LANE, and LANE MORTGAGE COMPANY, a corporation, as Trustee of George A. Hendricks and Anna S. Hendricks, his wife; W. S. KANOUSE and ANNA P. KANOUSE, his wife; FLORENCE B. KANOUSE, A. MAUDE MCFADDEN PRICE, RUTH MCFADDEN, MARIE KOHL SMITH, MARY A. VAN DEGRIFT, HAZEL M. HARPER, GRACE L. BROOKS, GRACE B. POTEET, ANNA BAUMANN, HAROLD A. HINCKLEY, LYLE E. WEST and MAUD E. LANE,
Respondents.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

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Respondents.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Harlan P. Stone, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

May It Please the Court:

The petition of Will H. Perry respectfully shows to this Honorable Court:

I.

Jurisdiction.

Jurisdiction herein is predicated upon Judicial Code, Section 240-a, as amended by the Act of February 13, 1935, Chapter 229, Section 1, 43 Stat. 936.

Reference is made, also, to Rule No. 38-5(b) of the Supreme Court, wherein is specified some of the reasons which will be considered by the Supreme Court in the exercise of its sound judicial discretion with respect to the issuance of writs of certiorari.

II.

Summary Statement of the Case.

The debtor, Will H. Perry, also known as William H. Perry, filed a debtor's petition in proceedings under Section 75 of the Bankruptcy Act on April 9, 1940, in the United States District Court for the Southern District of California. [Tr. pp. 2-4.] An order was entered on the same day approving the debtor's petition and ordering that the matter be referred to C. P. Von Herzen, Esq., one of the Conciliation Commissioners in bankruptcy of that Court, to take such further proceedings therein as might be required. [Tr. pp. 4-5.] On July 26, 1940, Anna Baumann, a judgment creditor, filed a motion to dismiss the proceeding and to vacate any and all stays of proceedings, whether by order or by operation of law, in connection with said proceeding. [Tr. pp. 5-8.] This motion was made on the ground that the debtor was not a farmer within the meaning of Section 75-r of the Bankruptcy Act. The motion was supported by the affidavit of Thomas F. McCue, her attorney. [Tr. pp. 8-17.]

On the same day, to-wit, June 26, 1940, Maud E. Lane, a creditor of the debtor, likewise filed a notice of motion to dismiss proceedings and to vacate stay of proceedings. [Tr. pp. 17-19.] This motion was made upon the grounds that the debtor was not a farmer, as defined by Section

75-r of the Bankruptcy Act, that the proceedings were not instituted by the debtor in good faith, and that it would be impossible for the debtor to rehabilitate himself or to offer a fair, just, or equitable settlement or composition with his creditors. This motion was supported by the affidavit of Wm. J. Clark, attorney for Maud E. Lane. [Tr. pp. 20-24.]

On the same day Lane Mortgage Company, a corporation, as trustee for various parties, also filed a notice of motion to dismiss the proceedings and to vacate any and all stays of proceedings. [Tr. pp. 24-26.] This motion was made upon the ground that the debtor was not a farmer, as defined by Section 75-r of the Bankruptcy Act as amended. This motion was supported by the affidavit of C. H. Scharnikow, attorney for Lane Mortgage Company. [Tr. pp. 27-30.]

Counter-affidavits were filed by the debtor to each of these motions. [Tr. pp. 58-77.] Wm. J. Clark, attorney for Maud E. Lane, filed a rebuttal affidavit. [Tr. pp. 77-86.] Will H. Perry filed an affidavit in rebuttal to the rebuttal affidavit of said Wm. J. Clark. [Tr. pp. 90-99.]

On June 28, 1940, a summary of the evidence given by the debtor at the hearings before the Conciliation Commissioner in connection with said debtor proceedings was filed. This summary of evidence, by reference, was incorporated in its entirety in the said affidavit of Will Perry in opposition to the motion made by Anna Baumann, through her attorney, Thomas F. McCue [Tr. p. 65]; and likewise, by reference, was made part of his affidavits in opposition to the motion of the other parties seeking to dismiss the proceedings. [Tr. pp. 69, 76.]

A résumé of facts established upon examination of the debtor before him, made by C. P. Von Herzen, the Conciliation Commissioner, was filed on July 1, 1940. [Tr. pp. 87-89.] This resumé was one of the papers upon which each of the motions to dismiss was based. [Tr. pp. 8, 19, 26.] Said motions came on for hearing before the District Judge on said affidavits, said summary of evidence of the debtor, and said resumé of facts by the Conciliation Commissioner. After said hearing, the Court on August 30, 1940, made an order granting the motions to dismiss the proceedings.

An appeal was taken from said order, and on the 4th day of September, 1941, the United States Circuit Court of Appeals for the Ninth Circuit filed its opinion directing that the order be reversed and the case remanded to the District Court. The mandate of the United States Circuit Court of Appeals for the Ninth Circuit was recorded in the minutes of the District Court and provided as follows:

> "It is hereby ordered, adjudged and decreed by this Court that the order of the said District Court be, and the same hereby is reversed, and that the case be and is hereby remanded to the said District Court with directions to find the facts specially, state separately its conclusions of law thereon, and direct the entry of the appropriate judgment all in conformity with Rule 52-a, with costs in favor of appellant against appellee.
>
> "It is further ordered, adjudged and decreed that the appellant recover against appellee for his costs herein expended and have execution therefor." [Tr. Case 10050 pp. 5-6.]

On October 14, 1941, the debtor filed a petition praying that an order be made, directing that a hearing be had

upon the motions to dismiss either before a judge of the Court or before the Conciliation Commissioner as the Court in its discretion might determine. On November 21, 1941, the Court denied the petition of the debtor and proceeded to make its findings of fact, conclusions of law and judgment based upon the evidence introduced and submitted on the hearing leading to the making of the order of dismissal of August 30, 1940, thereafter reversed as hereinbefore set forth. Such findings of fact and conclusions of law were filed on November 26, 1941, and the judgment was filed on the same day. Upon the findings of fact, as conclusions of law, the Court concluded that the debtor was not a farmer within the definition of Section 75-r of the Bankruptcy Act, and that the respective motions of the several creditors filing motions for dismissal should be granted; and that all stays of proceedings in state courts should be vacated. The judgment adjudged that said debtor was not a farmer within the meaning of Section 75-r of the Bankruptcy Act, and that the respective motions of the creditors filing petitions to dismiss should be granted, and that all stays of proceedings affecting actions pending in state courts should be vacated.

The District Court had jurisdiction of said matters involved in this proceeding by virtue of the provisions of the Bankruptcy Act of 1898 and amendments thereto, and particularly Section 75 of said Bankruptcy Act. Sections 24(a), 24(b) and 25(a) and Section 75 of the Bankruptcy Act sustain the jurisdiction of the Circuit Court of Appeals in respect to this appeal. The appeal to the Circuit Court of Appeals was taken pursuant to said sections and pursuant to Rules 73, 75 and 76 of the Federal Rules of Civil Procedure.

An appeal was taken to the Circuit Court of Appeals for for the Ninth Circuit from this second judgment of the lower court. A copy of the opinion of the appellate court is included in the record. In this opinion the appellate court stated that the findings of the lower court, that Perry was not a farmer within the meaning of Section 75 of the Bankruptcy Act, were amply supported by the evidence and would not be disturbed. The appellate court did not discuss the findings or the evidence, if any, which, in its opinion, amply or otherwise supported these findings. We must, therefore, in presenting this writ to the Supreme Court discuss the findings of the lower court and the evidence upon which they are based, all of which are set out in the record herein.

III.

Summary Statement of Facts.

The debtor was born on a farm in northwestern Iowa. [Tr. p. 78.] He was eighteen years old when he left home and from that time on there has never been a time he has not owned one or more farms. [Tr. p. 91.] He is now the owner of the La Costa Ranch near Oceanside, California, containing approximately 2600 acres. [Tr. p. 87.] This ranch is incumbered with a trust deed whereon there is claimed to be an unpaid balance of approximately $100,000.00. Litigation between the debtor and the alleged beneficiaries under the deed of trust is pending in San Diego County, in which the debtor asserts nothing is owing, and in which the said alleged beneficiaries assert the entire sum is due and payable. A memo opinion by the Superior Court of San Diego County was rendered prior to the filing of the petition under Section 75, holding in favor of the beneficiaries under the trust deed, but no

findings of fact or judgment had been entered at the time of the filing of the petition under Section 75-a-r. [Tr. p. 88.] The debtor is likewise the owner of the Triangle Ranch in Modoc County, California, containing approximately 18,000 acres. [Tr. p. 87.] The farming activities of the debtor at the time of the filing of his petition for relief under Section 75 centered around these two properties. At the time of the filing of said petition, debtor also claimed to own a building in the City of Los Angeles, known as the Commercial Club Building. [Tr. pp. 13, 87.] His title to this building, however, was disputed, a judgment having been entered in the Superior Court of Los Angeles County, California, in an action entitled "Baumann v. Harrison *et al.*," numbered 413397 in said Court, wherein the Court found [Tr. pp. 14-15] "that any and all right, title, interest and claims of said defendant, Will H. Perry, whether individually or as nominee of W. G. Lane or Lane Mortgage Company, then received or since acquired, were acquired, received, and held in trust for the plaintiff and the other bondholders." An appeal was pending from this judgment. This building was subject to a deed of trust in the amount of $500,000.00 securing an issue of bonds. Anna Baumann was one of the bondholders and the action was one by her as a bondholder and on behalf of all the other bondholders. [Tr. pp. 13-15.]

The contention of the parties moving to dismiss the debtor's petition in the main center around his activities in connection with this building.

For a number of years no taxes have been paid upon any of the above properties nor has any interest been paid upon such obligations. [Tr. pp. 28-30.] The debtor contends that the farm properties are of a value considerably

in excess of the incumbrances. The parties moving to dismiss the debtor proceedings claim that the incumbrances on each of said properties far exceed the value of the properties. [Tr. p. 24.]

The debtor also holds a real estate broker's license. For many years last past, however, he has received no money whatever from any activities as a real estate broker. [Tr. pp. 33, 71.]

The La Costa Ranch was acquired by the debtor in 1921. Since that time he has owned and operated it. [Tr. p. 91.] Since 1936 he has operated such ranch under the requirements prescribed by the Agricultural Adjustment Administration of the United States Government, and has obtained payment for soil conservation, crop control, gully control and other work done under the requirements of said agency. In compliance with the requirements of said agency, he grew grass and grain upon large areas of said ranch, but was not allowed to cut or sell the same, and was only permitted to sell and dispose of the same for pasturing of live stock. In other cases, crops planted on large areas of said land were plowed under for soil conservation. [Tr. pp. 68-69.] In 1939, in addition to the work done under requirements of said government agency, debtor planted for his own account about 200 acres of land, but on account of storm damage sold very little off of said acreage. He also planted about 60 acres of beans, but was able to harvest only about 14 acres. He also rented about 250 acres to a tenant. [Tr. pp. 40-41.]

The debtor lived in Los Angeles, but went to the La Costa Ranch nearly every week, except for a time when he was incapacitated due to injuries received while on the said

ranch. [Tr. p. 34.] He estimated that he spent about 75 days on the ranch during the year preceding the filing of his petition. [Tr. pp. 36, 40, 41.] When on the ranch he helped with the physical labor in connection with the farming operations. He had employees likewise to help him. [Tr. p. 41.] He has spent probably in the neighborhood of $20,000.00 on this ranch. [Tr. p. 33.]

Debtor in 1931, with respect to the Triangle Ranch in Modoc County, California, acquired the ownership of the capital stock of the Co-operative Land and Livestock Company. Although his wife held one share of record and Mr. Taylor, resident manager of the corporation, held one share, the debtor was in fact the owner of said shares. [Tr. pp. 36-37.] Thereafter the corporation transferred the record title of the Triangle Ranch to debtor's daughter, who thereupon leased the property to debtor. The daughter admitted she held such record title for and on behalf of the debtor, and he was the real owner of the ranch. [Tr. p. 87.] That ranch is subject to an incumbrance of $300,000.00. [Tr. p. 29.]

In connection with the Triangle Ranch, debtor has also qualified under the United States Government Agricultural Program, and has received various sums of money for a compliance with the requirements of said governmental agency. In the main, this property has been used for pasturage purposes. It is what is known as irrigated pasture, in that the lands involved must be irrigated by being flooded, and when necessary be seeded to grass, which grass is allowed to grow to maturity, so as to allow the seeds from the heads thereof to shatter and provide reseeding for said meadows. In order to accomplish this, the debtor was required to provide adequate irrigation

facilities, all fencing and all dams and dikes had to be kept in repair. In this connection he maintained reservoirs, dams and water diversion levees. Because of the remote location of the said ranch from transportation facilities, it was not profitable to grow hay on saidl ranch, harvest, and bale and ship the same. Consequently the grass or grain grown was in the main sold for said pasturage purposes. In 1938, however, grain to the amount of $1522.88 was sold from the ranch, while about an equal amount was retained upon the ranch for feeding horses and live stock, and for reseeding purposes. In November, 1939, debtor sold live stock of the value of $2000.00, which he had personally raised on said ranch. [Tr. pp. 66-69.] A rental arrangement was made by the debtor with one Frank Pocock during 1939-1940, who agreed to pay $15,000.00 rental. However, no money was paid, though a sum of money amounting to $2668.00 was obtained through a trade. [Tr. p. 50.] The debtor was not on the Triangle Ranch in 1940, up until the time of the filing of the petition, and in 1939 was there about eight times. He spent from one to three weeks on each trip. Ordinarily the time consumed in going and coming from the ranch consumed about one week. [Tr. p. 34.]

The debtor's connection with the Commercial Club Building began in 1933. At that time the previous owner was unable to carry the building any longer, and had abandoned it. At that time taxes and interest were delinquent for two years, and due to the current depression the building could not be operated profitably. In November

of 1935, at the insistence of the bondholders, a lease covering the building was made to one Tremaine, who remained in possession of the building for almost one year. During the last nine months of his occupancy he paid only $250.00 in rentals. In the month of October, 1936, Tremaine was removed from possession, and the debtor took over the operation of the building and operated it until April of 1937. On that date a receiver was placed in possession of the building, and has remained in possession ever since. [Tr. pp. 96-97.] After the receiver took over the property the debtor operated the bar and the bar dining rooms on the 4th and 5th floors. He then rented out the dining rooms and continued operation of the bar. For a time he paid rent to the receiver, and thereafter as a subtenant to a tenant of the receiver. His rents have ranged from $45.00 to $200.00. At the time of the filing of the petition he paid $150.00 per month rental. [Tr. p. 32.] The debtor has never personally operated the bar. He is not a bartender. He employed two bartenders and a janitor. [Tr. p. 32.] He has spent possibly half of his time in the building since the receiver went in. The Court found that more than 50% of the personal time and attention of the debtor was devoted to his activities in and about the said Commercial Club Building in the City of Los Angeles. We think, however, that the evidence establishes that the greater part of the time spent by the debtor in the building was devoted to activities and farming operations of the two farms in San Diego and Modoc Counties and that three-fourths of his time was spent in connection with his farming operations. [Tr. p. 36.]

The Commercial Club Building is incumbered by a deed of trust in the amount of $500,000.00 to secure bonds issued in that amount. [Tr. p. 13.] This issue of bonds covered the property at the time Perry acquired his asserted ownership. [Tr. p. 14.]

Following is a statement of his income derived from such activities: (1) During the years 1936-39, inclusive, debtor received from the La Costa Ranch $11,134.54 and paid out as expenses the sum of $2,661.85, leaving a net amount received by him of $8,472.69. [Tr. pp. 46-49.] (2) During the same period he received as income from the Triangle Ranch the sum of $20,625.23 and paid out as expenses the sum of $4,573.91, leaving a net amount received by him of $16,051.32. [Tr. pp. 50-53.] The net income received by him from his activities in connection with these two ranches was $24,524.01. (3) During the same period the debtor received as income from his activities in connection with the building the sum of $71,670.61 and paid out as expenses the sum of $70,838.44, leaving a net amount received by him of $832.17. [Tr. pp. 54-55.] (4) During this period nothing was realized by him from his license as a real estate broker.

The Court found that the income and disbursements with respect to the La Costa Ranch and the Triangle Ranch were in the amounts above set forth. [Tr. Case 10050 pp. 21-23.]

In connection with the income and disbursements relating to the Commercial Club Building, the Court found the income to be $71,950.61, instead of $71,670.61, and found that the debtor's statement of expenses were untrue to the extent of $9,044.29. [Tr. Case 10050 pp. 19-20.] The Court found that the debtor received no commissions or compensation whatever as a real estate broker.

IV.

Issues Involved.

The issues involved are:

1. Did the lower court err in refusing a new trial of the case and in entering findings of fact, conclusions of law and judgment on evidence leading to the making of the order which was reversed by the appellate court?

2. Was Will H. Perry a farmer within the meaning of Section 75 of the Bankruptcy Act?

3. Did the lower court in granting the motion of Maud E. Lane to dismiss the proceeding do so on the ground of the improbability of successful rehabilitation by the debtor as a farmer, or because of a lack of good faith on his part, and if so was the judgment erroneous in that respect?

IV.

Reasons Relied on for the Allowance of the Writ.

1. The Circuit Court of Appeals for the Ninth Circuit Has Decided an Important Question of the Federal Bankruptcy Law Which Has Not Been, but Should Be, Finally Settled by the Supreme Court of the United States.

The lower court and the appellate court, in determining that the debtor was not a farmer within the meaning of Section 75 of the Bankruptcy Act, must have concluded that the activities of the debtor in his operations of La Costa and Triangle Ranches in connection with his dealings with the Agricultural Adjustment Administration of the United States Government and in connection with his compliance with the requirements of the United States Governmental Agricultural Program wherein he received

payments from the federal government for soil conservation, crop and gully control, and other work referred to in the foregoing statement of facts, were not farming operations within the meaning of Section 75, of the Bankruptcy Act. Counsel for those moving to dismiss the debtor's petition insist that such operations were not farming operations, and that view was adopted by the two lower courts. The important question arises whether the operations of the debtor in conforming with the Agricultural Adjustment Administration of the United States Government with respect to crop conservation, etc. are farming operations. We, of course, insist that such activities and operations are farming operations.

2. The Circuit Court of Appeals for the Ninth Circuit has Failed to Give Effect to Decisions of This Court in Connection With Pasturage and Other Rentals Received by the Debtor, and May Have Failed to Give Effect to the Decision of This Court in John Hancock Mutual Life Insurance Co. v. Bartels, 308 U. S. 180, 60 U. S. Sp. Ct. 221, 84 L. Ed. 176.

The Circuit Court of Appeals for the Ninth Circuit has failed to give effect to decisions of this Court in connection with pasturage and other rentals received by the debtor. The lower court and the Circuit Court of Appeals, though conceding that debtor was *bona fide* personally engaged in producing products of the soil upon a portion of his farming property known as the La Costa Ranch, to-wit, on 243.6 acres thereof, nevertheless refused to consider pasturage and other rentals received by

him in connection with his two ranches as income derived from farming operations. In failing to treat said rentals as income derived from farming operations, the lower courts failed to give effect to the decision of this Court in *First National Bank and Trust Co. of Bridgeport, Connecticut v. Beach,* 57 S. Ct. 801, 301 U. S. 435, 81 L. Ed. 1206.

Maud E. Lane in her motion for dismissal in this case, in addition to basing same on the ground that debtor was not a farmer, also based same upon the proposition that the proceeding was not instituted in good faith, and that it was impossible for appellant to rehabilitate himself, or to offer creditors a fair, just or equitable composition. The Court in its Conclusion No. IV concluded that the motion of Maud E. Lane should be granted, but did not state upon what ground. In view of the fact that the Court made no findings of fact or conclusions of law in relation to the lack of good faith, or the impossibility of rehabilitation, we believe the Court intended to base its judgment upon the ground that debtor was not a farmer. If, however, it can be said that the judgment granting the motion of Maud E. Lane was based upon said grounds of lack of good faith and inability of rehabiliation, the judgment is not only erroneous by reason of the lack of evidence, findings of fact, and conclusions of law to sustain the same, but it is likewise contrary to law in that said grounds are not proper grounds for the dismissal of a petition, and it is contrary to the decision of this court in the case of *John Hancock Mutual Life Insurance Co. v. Bartels,* 308 U. S. 180, 60 U. S. Sp. Ct. 221, 84 L. Ed. 176.

3. Conflict of the Decision of the Ninth Circuit With the Decisions of the Other Circuit Courts of Appeals.

Section 75-r of the Bankruptcy Act provides that a person is a farmer within the meaning of that section if the principal part of his "income" is derived from the operations specified. The statute does not define what is meant by "income," whether it is "net" or "gross." The lower courts and counsel opposed to Perry took the position that the income referred to by the statute was gross and not net. The Circuit Court of Appeals for the Ninth Circuit by virtue of its approval of the findings of the District Court, and particularly Finding No. IX [Tr. 137], and Conclusion of Law No. II [Tr. 139], has taken the position that "gross income" is the income to be considered in connection with Section 75-r of the Bankruptcy Act. Admittedly, the gross income of the debtor in this case derived from activities other than farming activities was greater than the gross income received from farming operations. However, the net income received from the farming operations was greater than the net income received from other sources. The Circuit Court of Appeals for the Second Circuit, in the case of *Sherwood v. Kitcher*, 86 Fed. (2d) 750, 32 A. B. R. (N. S.) 596, has held that "net income" is the income meant by the use of the word "income" in said Section 75-r of the Bankruptcy Act. There thus appears to be a conflict of decision between that of the Circuit Court of Appeals for the Ninth Circuit, in our case, and that of the Circuit Court of Appeals for the Second Circuit in the case of *Sherwood v. Kitcher*.

VI.

Brief in Support of This Petition.

Attached to this petition, and as a part of same, is a brief in support thereof.

Wherefore, your petitioner respectfully prays that a writ of *certiorari* be issued out of and under the seal of this Honorable Court directed to the said Circuit Court of Appeals for the Ninth Circuit commanding that Court to certify and send to this Honorable Court for its review and determination, on a day to be named therein, a full and complete transcript of the record and all proceedings in the case numbered 10050 in that Court and entitled "Will H. Perry, also known as William H. Perry, Appellant, vs. Anna Baumann, Maud E. Lane, *et al.*, Appellants," and that its judgment therein made on June 8, 1942, may be reversed by this Honorable Court; and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

Dated at Los Angeles, California, this 5th day of August, 1942.

WILL H. PERRY,
Petitioner.

By REUBEN G. HUNT,
His Counsel.

ARTHUR WM. GREEN,
GRAINGER & HUNT,
Of Counsel for Petitioner.

Certificate of Counsel.

I hereby certify that I am counsel for the petitioner in the above-entitled cause and that, in my judgment, the foregoing petition is well founded in law and fact, and that the said petition is not interposed for delay.

Dated this 5th day of August, 1942.

REUBEN G. HUNT,
Counsel for Petitioner.